No. 3292.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AUGUST BLANC,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief of Defendant in Error

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REPLY BRIEF OF DEFENDANT IN ERROR.

In taking up the spechifications of Errors relied upon by the plaintiff in Error, we will endeavor to do so in numerical order.

First: As to the Court erring when it denied counsel's motion for an instructed verdict.

George Ohnimus, one of the Government witnesses, testified in part as follows:

> "On September 4th I saw the Campbell woman there; I have known her for the past eight years; I have always known her to be a prostitute." (See page 22, Tr.)

The same witness on page 25 of the Transcript, said:

"I had a conversation with Blanc on that day" (referring to September 4th, 1918). "I said, 'How many men have you been sending up to this woman? He said, 'A Few.' I said, 'What do you consider a few?' He said, 'Not many.' I said, 'What do you call many? He said, 'Probably three or four. In a day; I asked him that."

Clifford J. Way, a soldier, corroborated the testimony of Ohnimus (see page 26 Tr.) as to the conversation had with Blanc.

Louis Remegie, an agent for the Department of Justice, testified as follows:

(Page 16 Tr.) "On September 4th, around 2:45 P. M., I entered the Globe Hotel again" (he having been there the day previous) "and I met Mr. Blanc. I said, 'Is the girl in now?' He said, 'Yes; are you the fellow that was here yesterday afternoon—I mean last night?' I said, 'Yes'. He said, 'You're the fellow I told to come here at two o'clock?' I said, 'Yes.' He said, 'The girl is upstairs now.' I said, 'What room? He said, 'Room 16; you go up to room 16 and tell her I sent you there.' I went up into room 16 and the big fat girl came out and said, 'Come right in' and she took me into room 17, where two other fellows were seated waiting for the girl. I sat there a while, and she left the room and took one of the fellows into her room, and she came back and she said, 'You will be pretty soon.' I said, 'How much are you going to charge me for an act of prostitution?' She said, '$1.50'. I gave her the $1.50. After she received the $1.50 she took this other fellow in. I left the room and got officers Ohnimus and Dowell."

We submit that the evidence introduced by the Government was sufficient to allow the case to go to the Jury, for if the testimony given by Officer Ohnimus and soldier Way was true (which the Jury seems to believe it was), Blanc had been sending men to the Campbell woman right along, for the purpose of prostitution. This we believe is sufficient as to the first and second points relied upon by the Plaintiff in Error, and that the Court did not err in refusing to instruct the jury to bring in a verdict of not guilty.

Third: As to the third point, there cannot possibly be anything prejudicial to the plaintiff in error, as it is merely given in rebuttal to the testimony given by the Campbell woman, who is a known prostitute, and for whom (if we are to believe the testimony of Officer Ohnimus and soldier Way) Blanc was acting as pimp.

Fourth: There is nothing in the fourth point that warrants taking up the court's time. Because it is obvious from the law and information, on its face, that an offense was charged and is supported by a recent decision of this court entitled *United States vs. Grancourt, No.* 3249.

Fifth: The fifth point is so well fortified against, that we must go back into ancient history to find the beginning of such practice even here in this District.

In 1 *Saw* 701, Mr. Justice Fields says:

> "We are of the opinion that an information may be filed by the District Attorney in behalf of the United States in the National Court, for misdemeanors committed against the laws of the United States."

The motion to quash the Information was denied.

The decisions have since then been uniform on this point, in cases of misdemeanor.

In the cases of

United States vs. Wells Co., 186 Fed. 248;

Mackin vs. United States, 116 U. S. 384, 29 L. E. 909;

Re Bonner, 151 U. S. 242, 38 L. E. 149.

Judge McCall, in the J. Lindsay Wells & Co. case. spoke as follows:

> This is an action brought by the United States against J. Lindsay Wells Company under Section 2 of the Act of June 30, 1906, on the charge of shipping from Memphis, State of Tennessee, to Attica, in the State of Indiana, 30 tons of corron seed meal, which article of food at Memphis, Tenn., was adulterated."

The suit was brought upon information by the United States District Attorney.

The defendants move to quash the information upon the ground that the same violates that part of the Fifth Amendment of the Constitution of the

United States which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury.

The question presented is whether or not the offense alleged to have been committed by the defendant is a capital or otherwise infamous crime.

It is, of course, not a capital crime, and, if it is otherwise an infamous crime, the motion to quash must be allowed, since under the authorities, it is well settled that a prosecution cannot be maintained upon information made by the District Attorney for such a crime.

> *Ex parte Wilson,* 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

(1) As I understand the authorities, they hold that any offense, the punishment for which may be imprisonment in the penitentiary, with or without hard labor, is an infamous crime.

> *Mavin vs, U. S.,* 117 U. S. 248; 6 Sup. Ct 777, 29 L. Ed 909;
>
> *Parkinson vs. U. S.,* 121 U. S. 281; 7 Sup. Ct. 896; 30 L. Ed. 959;
>
> *In re Claasen,* 140 U. S. 204; 11 Sup. Ct. 735; 35 L. Ed. 409.

On an examination of the act under which this suit is instituted. I find that the punishment there-

for is a fine not exceeding $200 for the first offense, and, upon conviction for each subsequent offense, not exceeding $300 or by imprisonment not exceeding one year, or both, in the discretion of the court.

(2) Under the authorities above cited, it is held that a defendant cannot be imprisoned in the penitentiary, unless the time for which he is sentenced shall be more than one year.

Under the act of June 30th, 1906, the imprisonment cannot exceed one year.

Therefore, the court has no power to sentence the defendant to imprisonment in the penitentiary, because that would be in excess of the maximum time which the court is authorized to imprison a party for such offense.

As I understand the authorities, they hold in substance that where the court may imprison the accused for more than one year, the confinement must be in the penitentiary, and that fact, with or without labor, makes the offense for the commission of which the accused is imprisoned, an infamous crime.

Upon the other hand, where the period of imprisonment is for one year or less, the court must imprison in the county jail, and in such case the crime is not infamous.

If the court may imprison for more than one

year, the crime is infamous. If for a year or less, it is not infamous.

Under section 1022 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) it is provided that all crimes and offenses committed against the provisions of chapter 7 entitled "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by the District Attorney.

It appearing from the foregoing that the crime for which the defendant is charged is not infamous, I am of the opinion that this suit can be maintained upon the information filed, and the motion to quash will be disallowed.

The case of *United States vs. J. Lindsay Wells & Co.,* just quoted, is on all-fours on this point, and is founded on Statute, although there are numerous decisions at common law on the same point.

Section 335 (in effect January 1, 1910) of the Federal Penal Code reads as follows:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies; all other offenses shall be deemed misdemeanors."

Section 1022 of the United States Revised Statutes reads as follows:

> "All crimes and offenses committed against the provisions of Chapter Seven, Title 'Crimes'.

which are not infamous, may be prosecuted either by indictment or by information filed by a District Attorney.

These are the sections on which the J. Lindsay Wells & Co. case was based, and are sufficient both to define a misdemeanor and to justify the filing of an information in cases where the maximum imprisonment is one year or less.

We can see no reason for taking up the Court's time in argument here, as it is sufficient to say that if the Jury had reason to believe the evidence introduced for the prosecution in preference to that introduced by the defense the verdict was supported by good and sufficient evidence, and especially so, since the only corroborating witness for the defense was one Matilda Campbell, a well-known and confessed prostitute, who, it was claimed was "helping" Blanc to run the house, after she had already given him One Hundred (100) Dollars on account of the purchase price which she had forfeited.

The stories told by both Blanc and Campbell are typical of this class of offenders, where the woman is made the scapegoat of her pimp or paramour.

The cases cited on page 17 of the Brief of Plaintiff in Error may be good law, but they certainly do not apply in this case. We therefore do not feel justified in spending time arguing the matter, for the crime here charged does not carry with it a pen-

alty of hard labor or confinement in a penitentiary.

We respectfully submit that there is nothing in the points raised by Plaintiff in Error that would justify the verdict and judgment being disturbed.

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